Supreme Court, U.S.
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No. 98-1756

IN THE
Supreme Court of the United States

WAYNE EVANS and MADELYN EVANS, husband and wife,
Petitioners,

v.

TOHONO O'ODHAM NATION; WILLIE GILBERT; DAWSON RILEY and DAVINA RILEY; HAROLD MARCONDA; LINDA MARTIN and JACK MARTIN; JEREMY EVANS; DANIEL EVANS; HUNTINGTON CONSTRUCTION, INC.; WESTERN PACIFIC CONSTRUCTION, INC.; and VOICE OF GOD RECORDINGS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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The Brief in Opposition to Certiorari ("Brief"), presents no valid reason that this Court ought not review this case.

1. The issue is squarely raised by Petitioner Madelyn Evans, as well as her husband Wayne. Acknowledging that it sued not only Petitioner Wayne Evans but also his wife Madelyn, Respondent contends that it sued her only to obtain jurisdiction for a judgment against the entire

marital community. Brief p. 2. However, Respondent does not disagree with our statement that its development of evidence made "apparent that the Nation is pursuing her as a participant in allegedly fraudulent misconduct." Petition p. 3. Whether Respondent may ultimately seek or obtain a judgment against Madelyn directly or as part of the marital community, it is apparent that in this case Wayne Evans could raise the privilege to avoid testifying against her, even if only to avoid possible later criminal problems for her. More importantly for the appropriateness of this case for certiorari, there is virtually no question that Respondent seeks a judgment holding Wayne Evans liable for numerous criminal acts. If this Court accepts this case and reaffirms the existence of the marital privilege in a civil case, Madelyn Evans can raise the privilege against testifying against her husband Wayne. There is virtually no record infirmity to reaching that issue.

2. *Whether an anti-marital fact privilege is claimable* in toto *or case-by-case, while a subordinate point on the merits, does not make this case un-certworthy.* Respondent notes that in deciding this matter, the District Court observed that any privilege covers only testimony that is "adverse," and does not create a blanket privilege. Brief p. 4. It then argues the merits of this point, Brief pp. 13-15. If Respondent means to imply that there would not be such adverse testimony in this case, the Court is reminded of the seven different criminal offenses the Respondent has included in its complaint. Pet. p. 4. And, as we reiterate above, the Respondent is developing proofs of such crimes against both Petitioners. This case squarely presents the issue of an anti-marital fact privilege whether or not it must be asserted question-by-question. The District Court refused to allow even that kind of privilege.

If Respondent wishes to convince this Court that the District Court's ruling was as narrowly based as that, it is mistaken. The ruling, rather, was that "[T]here is no general anti-marital fact privilege in a federal civil case. Under the circumstances of this particular case, the Court declines to extend an anti-marital fact privilege to Defendants." Pet. App. 7a. While any consideration on the merits probably should include whether the privilege, which is intended to bolster marital harmony, provides blanket protection or must be invoked on a question-by-question basis, the District Court did not rest its decision on that point. Rather, it held, in clear contravention to *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1839) that there was no civil-case privilege.

3. The case also conflicts with this Court's rejection of "balancing test privileges." Respondent's attempt to portray the decision below as limited to the minor point of the privilege applying question-by-question overlooks that the decision also concluded alternatively that such a privilege might be invoked in some cases, but not others, and not in this case. That suggestion, based upon similar holdings from other cases, *see* Pet. App. 7a, contradicts at least three cases of this Court rejecting the use of a balancing test to determine privileges. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Jaffee v. Redmond*, 518 U.S. 1 (1996); *Upjohn Co. v. United States*, 449 U.S. 383 (1981). It is these basic points, squarely conflicting with *Stein* and the three above-cited cases, that compel a grant of certiorari.

4. The issue is more substantial; and much less thoughtfully dealt with in other cases, than Respondent's discussion of the merits indicates. Respondent seeks to downplay the importance of the issue by invoking the rubric that privileges are, in general, disapproved and

narrowly circumscribed where allowed; and by mischaracterizing the case law on the subject.

Respondent's general invocation of the principles of *United States v. Nixon*, 418 U.S. 683 (1973), and other cases, that privileges must be narrowly construed, is both undisputed and insufficient. For, as best exemplified by *Trammel v. United States*, 445 U.S. 40 (1980), this Court has reaffirmed the existence of the privilege notwithstanding direct recognition of the general rule of circumspection for privileges.

Respondent seeks to convince this Court that there is a body of lower court cases, adverse to Petitioner, well reasoned, and derived from cases of this Court, sufficient to leave the issue alone. That is just wrong.

The only lower court case, or secondary authority, that contained any real discussion of the issue was *Ryan v. Commissioner of Internal Revenue*, 568 F.2d. 531 (7th Cir. 1977). Its failings have been noted. Pet. p. 13. Its primary holding was that, contrary to the above-cited cases of this Court, a balancing-test privilege applied. Its alternative logic, that there was no civil-case privilege, turned out to be contrary to the subsequent *Trammel* case, *supra*, particularly in its reliance upon the disapproved Federal Evidence Rule 505.[1] This Court in *Trammel* observed that the process of adopting the Federal Rules of Evidence, particularly Congress' rejection of Rule 505, in favor of Congressionally-drafted general rule 501, supported the *Trammel* court's reaffirmation of the privilege,

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[1] The Petition erroneously referred, Pet. p. 14 and n. 5, to *Hawkins v. United States*, 358 U.S. 74 (1958), instead of to *Trammel, supra*, as the case decided after both *Ryan* and the adoption of the Federal Rules of Evidence, which case dealt (albeit without citing *Hawkins*) with arguments raised in *Ryan*. *Trammel* was the intended reference.

albeit only at the claim of the spouse-witness. *Ryan* is not only not a basis for denying review, it prompts review of this case, which relied at least in part upon *Ryan*.

Respondent also distorts the import of *United States v. Premises Known as 281 Syosset Woodburry Road*, 71 F.3d 1067 (2d Cir. 1995), when it says, Brief p. 11, that the case in large part followed *Trammel* and its reasoning. But just as discussed in the Petition, pp. 12-17, *Syosset* cited numerous cases and secondary sources other than *Trammel*, for its statement that the privilege did not apply to civil cases. 71 F.3d at 1070. It then proceeded to demonstrate that statement to be *dictum*, saying that "On the facts presented here, however, we decline to reach that question," *ibid.*, because the case before it did not present possible testimony of one spouse against another. Indeed, after citing *Trammel* solely to demonstrate the purpose of the privilege—marital harmony—and not for limitation to criminal cases, the Second Circuit said "The relevant distinction in the case before us is not whether the action is criminal or civil. Mrs. Caminola would be equally unable to avail herself of the adverse spousal testimony privilege if this were a criminal prosecution against her." *Id.* at 1071. *Syosset* not only didn't follow *Trammel* and its reasoning to withhold the privilege in civil cases, it didn't decide that at all.

Cases newly cited here by respondent, *Securities Exchange Commission v. Lavin*, 111 F.3d 921 (D.C. Cir. 1997); *In re Grand Jury Matter*, 673 F.2d 688, 691-692 (3d Cir. 1982) and *United States v. Van Drunen*, 501 F.2d 1393, 1396 (7th Cir. 1974), do not hold or decide that no privilege is claimable in a civil case. Rather, they simply state that the privilege *does* apply in a criminal case.

Respondent argues that the various cases criticized by Petitioners, as setting forth *dictum* that no privilege arises

in a civil case, are supported by *Hawkins* and *Trammel*. But *Hawkins* and *Trammel* do not reach such a holding. Instead, they simply use criminal-case language in deciding the existence and scope of the privilege in criminal cases. They do not in any way disapprove an anti-marital fact privilege in a civil case.

5. Respondent, like the Court below, would write out of existence Evidence Rule 501's clause pertaining to privilege for claims arising out of state law. Respondent gives a token quote of Rule 501's dictate that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with state law." It then proceeds to argue for expungement of that portion of the rule whenever a civil action has both state and federal claims, acknowledging that the court in this case so held, and arguing that all other courts have "invariably found that in cases such as this, involving federal question jurisdiction and pendent state law claims, the federal law of privileges applies." Brief p. 15. Not only should that not be the rule, Respondent's own authorities do not support it. *See* string cite and parenthetical quotes, Brief pp. 15, 16, some of which say that, and others not. Indeed, *Abbott v. Kidder, Peabody & Co.*, 1997 WL 337228 (N.D. Ill. 1997), cited by Respondent, Brief p. 11, concludes that although in cases of dual-based claims federal law should prevail, state law should be taken into account in determining that federal privilege. And in *Mercado v. Division of New York State Police*, 989 F. Supp. 521 (S.D.N.Y. 1998), the District Court turned to a state privilege for a federal claim, balancing the state interest, the privilege, against the federal interest in obtaining evidence for the particular evidence. Petitioners asked the lower court in

this case to do that. The decision did not deal with the issue.

Respondent cites learned treatises which do say that for cases involving both federal and state claims, the federal law of privilege should override that of the state, for the entire case. But such contentions are not logical applications of this portion of Rule 501. Regardless whether there are numerous cases or other authorities which approve of ignoring the plain language of a statute or rule, this Court cannot shirk its duty to interpret and apply that language. *E.g., Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, —— U.S. ——, 1998 WL 85319 (1998). Not to do so for this congressionally-enacted rule is tantamount to allowing to go unreviewed a case that holds a statute unconstitutional.

Further, the reasoning of the Respondent's cited treatises, Brief pp. 16, 17, that the rule favoring admissibility, and of circumspection in recognizing and defining privileges, arising out of federal law should trump state concerns for privileges, is much weaker, if it is to be applied at all to a marital privilege. This Court has historically given extraordinary deference to the states' roles in matters of marriage and the family; and it has done so in pervasive areas of federal jurisdiction and procedure. "As a general matter, [t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Boggs v. Boggs*, —— U.S. ——, 117 S.Ct. 1754, 1764 (1997), *quoting In re Burrus*, 136 U.S. 586, 593, 594 (1890). This lower court decision should not be allowed cavalierly to subjugate that cornerstone proposition of federalism to a rule that if any civil case has a federal claim, federal privilege law completely determines the matter.

6. Conclusion. The clearest error in the Brief of Respondent is the contention, Brief p. 6, that *Stein, supra*, "did not specifically address the privilege," and its contention that only a rule of spousal disqualification to be a witness was dealt with in that case. Reading the *Stein* opinion clearly disproves that assertion. In *Stein*, the Court said:

> "The rule does not seem to be entirely settled . . . It is, however, admitted in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband; *or* to disclose that which she has learned from him in their confidential intercourse." 38 U.S. at 222 (emphasis supplied).

The *Stein* court made clear in this passage that it was recognizing both the confidential communication privilege *and* the anti-marital fact privilege. And while *Funk v. United States*, 290 U.S. 371 (1933) recognized that the "witness competency" underpinnings of *Stein* have changed, there is no doubt that *Stein* was based on the "marital harmony" considerations that have been the underpinnings of this Court's recent anti-marital fact privileges. *E.g., Trammel v. United States*, 445 U.S. 40 (1980); *Hawkins v. United States*, 258 U.S. 74 (1958). The *Stein* court said:

> "The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. . . .
>
> . . . .
>
> This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest

> and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence. 38 U.S. at 222, 223.

With the modern-day anti-marital privilege thus deriving from the above-described considerations of marital harmony, the privilege is no longer a "relic" of antiquated legal and social views about the status of females. Instead, it is clearly premised upon the view that the marriage relation requires this protection to improve odds for successful marriages. That is both a salutary, and gender-neutral, rule.

Based upon a stretching of lower court cases' holdings and statements, Respondent would have this Court refuse review of a case which conflicts as much as can be with *Stein*; which involves an issue that goes to the root of the social order; which involves an issue given great significance both by this Court in previous opinions, and by Congress in its rejection of a differing rule about this privilege. This Court must speak upon this issue.

Respectfully submitted,

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